

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CAPITAL REPORTING COMPANY)	FOIA Control No. 2008-116
)	
On Request for Inspection of Records)	
)	
)	
NEAL R. GROSS & CO., INC.)	
)	
On Request for Confidential Treatment)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2009**Released: October 1, 2009**

By the Commission:

1. By this memorandum opinion and order, we deny an application for review filed by Neal R. Gross & Co., Inc. (Gross)¹ of the decision of the Office of Managing Director (OMD)² granting in part a Freedom of Information (FOIA) request by Capital Reporting Company (Capital)³ for a copy of Gross's winning bid for court reporting services supplied to the Commission in connection with the public hearing on media ownership held in Seattle, Washington on November 9, 2007.⁴ Capital indicated that it had submitted a competing bid for the services.⁵

¹ Letter from Neal R. Gross, President, Neal R. Gross & Co. to Matthew Berry, Esq., General Counsel (January 28, 2008) (AFR).

² Letter from Mindy J. Ginsburg, Deputy Managing Director to Elizabeth King (January 25, 2008) (Ruling).

³ Letter from Elizabeth King, Director of Operations to Joann Summers, Contract Specialist, Capital Reporting Company (December 4, 2007) (Request).

⁴ Request at 1. The request erroneously described the records sought as relating to the "2008 NCUA Board Meetings." Capital clarified in a telephone conversation that it meant to refer to the Seattle public hearing. *See* Ruling at 1 n.1. *See also* <http://www.fcc.gov/ownership/hearing-seattle110907.html> . Capital also sought copies of the non-winning bids for the contract. OMD withheld the non-winning bids submitted for the contract because their release is prohibited by 41 U.S.C. § 253b(m) and 48 C.F.R. § 24.202(a). *Id.* at 2. That portion of the Ruling has not been appealed.

⁵ *See* Request, *supra* n. 3.

I. BACKGROUND

2. In response to Capital's FOIA request, OMD ruled that it would release a redacted copy of records relating to the contract awarded to Gross.⁶ These records consist of an FCC Optional Form 347 "Order for Supplies and Services," dated November 7, 2007, which was issued to Gross for the reporting services in question, and Standard Form 30 "Amendment of Solicitation/Modification of Contract, dated December 14, 2007, revising the terms of the contract. OMD indicated that it was redacting unit price information from both documents pursuant to FOIA Exemption 4,⁷ but would release the total price for the contract.⁸ OMD noted that Gross had objected to the release of any cost information because "information is company confidential and its release would greatly jeopardize our competitive position."⁹

3. In its application for review, Gross contends that the total price should be redacted from the forms because release of the total price, no less than the release of unit price information, would cause competitive harm to Gross.¹⁰ Gross observes that the Commission has posted the transcript prepared by Gross of the Seattle hearing on the Commission's website and that the posted transcript indicates that it is 516 pages long.¹¹ Gross states "anyone can simply divide the 'total price' . . . by the total pages . . . and [the unit price information withheld by OMD] would be disclosed."¹² Gross contends that the Commission may not effectively disclose confidential information by releasing, in a piecemeal fashion, information that would enable a third party to determine the confidential information withheld.¹³

II. PRELIMINARY MATTER

4. Capital did not initially respond to Gross's AFR. In response to an inquiry by the Office of General Counsel as to whether Capital had responded or intended to respond to Gross' AFR, Capital submitted a letter.¹⁴ Capital's letter, however, did not respond to Gross's AFR. Rather, it stated: "Please allow this letter to serve as an appeal of the above-referenced matter [*i.e.*, OMD's Ruling]."¹⁵ Appeals of FOIA decisions must, however, be filed within 30 days of

⁶ Ruling at 1-2. Because the records sought appeared to contain potentially confidential information, OMD notified Gross of Capital's request, and Gross sought confidential treatment for certain information. *Id.* at 1. See 47 C.F.R. § 0.461(d)(3) (notification requirement); 47 C.F.R. § 0.459 (requests for confidentiality).

⁷ 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempt from disclosure under the FOIA).

⁸ Ruling at 1-2.

⁹ Ruling at 1, *quoting* E-mail from Rick Russell, Neal R. Gross & Co., Inc. to Sanford Williams, Federal Communications Commission.

¹⁰ AFR at 1-2.

¹¹ *Id.* See <http://www.fcc.gov/ownership/hearing-seattle110907.html>.

¹² AFR at 2.

¹³ *Id.*

¹⁴ Letter from Wayne R. Cohen, General Counsel to Mr. David S. Senzel (July 9, 2008).

¹⁵ *Id.* at 1 (arguing that unit pricing information should be disclosed).

the decision, and we see no public interest in considering such an untimely appeal.¹⁶ We will therefore not consider the merits of Capital's late-filed AFR.¹⁷

III. DISCUSSION

5. Commercial or financial information required to be submitted to the Commission will be deemed confidential if disclosure would cause competitive harm to the submitter or if disclosure would impair the government's ability to obtain such information in the future.¹⁸ While OMD redacted unit price information pursuant to this standard, it did not redact the total contract price, and we uphold OMD's decision to disclose that information.

6. Specifically, we disagree with Gross's contention that disclosure of the total contract price would enable Gross's competitors to "reverse engineer" and thereby discover the unit prices.¹⁹ Gross's competitors could not assume that the total contract price reflects a straight per-page unit price. Contracts for reporting and transcription services customarily contain provisions for hourly fees as well as per-page fees. For example, we note that Capital's own GSA schedule lists both per-page charges and per-hour charges for some services.²⁰ The rates charged in such contracts may also depend upon when the recordings and transcripts will be delivered. Further, depending on the nature of the contract, companies may discount unit prices depending on the quantity of services involved. We note that the contract at issue here has a combination of these terms. To better protect Gross from effective disclosure of its unit prices, we will redact terms that would alert a competitor to the nature of the unit prices charged (such as whether the contract specifies a time period during which services will be rendered or a delivery date).

7. Another factor also supports disclosure of the total contract price. In general, total contract prices are routinely made available to the public.²¹ Disclosure of such information is consistent with the core purpose of the FOIA, which is to "inform[] citizens what their

¹⁶ See 47 C.F.R. 0.461(j).

¹⁷ See *David A. Larson*, 22 FCC Rcd 5281 (2007) (application for review dismissed as untimely) and cases cited therein.

¹⁸ See *Critical Mass Energy Project v. FCC*, 975 F.2d 871, 878-79 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (discussing applicable factors). See also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (discussing applicable factors).

¹⁹ Compare *id.* at 1190-91 (finding that disclosure of Contractor Line-items would enable competitors to derive McDonnell Douglas's Vendor Pricing Factor (a form of mark-up)) with *id.* at 1191-92 (finding that disclosure of Over and Above Work Contractor Line-items would not allow competitors to derive McDonnell Douglas's Labor Pricing Factor (another form of mark-up)).

²⁰ See Contract #GS-07F-0528T (Capital's GSA schedule may be viewed online at <http://www.gsaelibrary.gsa.gov/ElibMain/contractorInfo.do?contractNumber=GS-07F-0528T&contractorName=CAPITAL+REPORTING+COMPANY&executeQuery=YES>). Gross's GSA Schedule, by contrast, lists only a per-page charge. See Contract #GS-07F-0444N.

²¹ See *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d at 1193, citing JAMES T. REILLY, 1 FEDERAL INFORMATION DISCLOSURE § 14.84 (3d ed.. 2004). See also <http://www.fcc.gov/omd/contracts/post-award/> (FCC's posting of contracts it has recently awarded, including total contract price); <https://www.fbo.gov/index?s=agency&mode=form&tab=notices&id=461015d6812a0438ee174dcfbc8458e5> (including synopses of awarded FCC contracts, including total contract price, posted at FedBizOpps.gov, the official government point-of-entry for vendors and buyers, as provided by FAR Part 5).

government is up to,”²² because it informs the public how much the government actually pays for various types of products and services. Accordingly, we agree with OMD that the total contract price should not be redacted from the copy of the contract provided to Capital.

IV. ORDERING CLAUSES

8. Accordingly, it is ordered that the application for review filed by Neal Gross & Co., Inc. IS DENIED. If Gross does not seek a judicial stay within ten (10) working days of the date of release of this decision, the records will be produced to Capital as indicated. *See* 47 C.F.R. § 0.461(i)(4).

9. It is further ordered that the application for review, filed by Capital Reporting Company IS DISMISSED as untimely. Capital may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).

10. The officials responsible for this action are the following: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²² *See McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force*, 375 F.3d at 1193, *citing, Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989) (Internal quotation marks omitted).